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In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

HORACIO RAMOS MIRANDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

BARRY SULLIVAN
Assistant to the Solicitor General

VICTOR D. STONE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Immigration and Naturalization Service may be equitably estopped from denying immediate relative status to an alien who is statutorily ineligible for such status, on the ground that the Service did not act upon the visa petition filed by the alien's former wife in the 18-month period between the time that the petition was filed and withdrawn.

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HORACIO RAMOS MIRANDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is reported at 638 F.2d 83. The opinions of the Board of Immigration Appeals (App. C, *infra*, 4a-8a) and the Immigration Court (App. D, *infra*, 9a-11a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1980, and a petition for rehearing was denied on March 24, 1981 (App. B, *infra*, 3a). On June 12, 1981, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including July 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 106(a)(4) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(4), provides in pertinent part:

> [T]he petition [for judicial review of orders of deportation] shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive * * *.

Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a), provides in pertinent part:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 C.F.R. 245.1(d) provides in pertinent part:

> An applicant who claims immediate relative status under section 201(b) * * * of the Act is not eligible for the benefits of section 245 of the Act unless he/she is the beneficiary of a valid unexpired visa petition filed in accordance with Part 204 of this chapter and approved to accord him/her such status.

8 C.F.R. 245.2(a)(2) provides in pertinent part:

> Before an application for adjustment of status under section 245 of the Act may be considered properly filed, a visa must be immediately available. If a visa would be immediately available only upon approval of a visa petition, the application will not be considered properly filed unless such petition has first been approved. If a visa petition is submitted simultaneously with the adjustment application, the adjustment application shall be retained for processing only if approval of the petition when reached for adjudication would make a visa immediately available at the time of filing of the adjustment application.

STATEMENT

1. Respondent Horacio Ramos Miranda, a 47 year old citizen of the Philippines, entered the United States on July 23, 1971, as a visitor for pleasure with authority to remain until December 1, 1971 (App. D, *infra*, 9a-10a). On May 27, 1976, Linda Milligan, a citizen of the United States, signed a visa petition in which she named respondent as an alien beneficiary and requested that he be granted an immigrant visa as her spouse, pursuant to their mar-

riage of May 26, 1976 (R. 76, 76-A).[1] See 8 U.S.C. 1151(a) and (b). The visa petition signed by Milligan, which (if approved) would qualify respondent as a person to whom "an immigrant visa is immediately available * * *" (8 U.S.C. 1255(a)(3)), together with respondent's separate application for adjustment of status to that of permanent resident alien, were filed with the Immigration and Naturalization Service on June 10, 1976 (R. 66, 66-B, 76). Respondent stated in his application for adjustment of status that he had been employed continuously in the United States since October 1971 and that he previously had been married to Josefina Lazatin from September 1971 to April 1972 (R. 70-72).

2. On December 5, 1977, prior to the Service's adjudication of the visa petition, Milligan withdrew the petition and explicitly "waive[d] any right to any appeal" (R. 75). Shortly thereafter, the Service's District Director denied respondent's application for adjustment of status on the ground of statutory ineligibility because no immigrant visa was "immediately available" to him. The District Director noted that respondent's application was no longer supported by the visa petition that Milligan had filed on his behalf, that there was nothing in the record to suggest that respondent was entitled to any other immigrant classification, and that respondent had "not established that an immigrant visa [was] immediately available" to him (R. 78). Respondent did not seek review of this order.

3. The Service subsequently issued an order to show cause why respondent should not be deported

[1] "R." refers to the certified administrative record in the court of appeals, a copy of which has been lodged with the Clerk of the Court.

as an "overstayed" visitor. See 8 U.S.C. 1251(a)(2). At deportation hearings conducted in March 1978 (R. 20-38), respondent conceded deportability but renewed his application for permanent resident status, relying solely on his prior marriage to Milligan (R. 27-31). In support of his application, respondent presented no evidence except for two documents, Milligan's petition for dissolution of the marriage and a court order requiring respondent to pay spousal support,[2] both of which he offered to show the bona fides of his former marriage (R. 29-31, 50-53). Although the immigration judge questioned the relevance of the bona fides of respondent's former marriage, respondent simply stated, "[t]hat is my offer of proof. I submit that it is relevant" (R. 31).

The immigration judge ruled that respondent's argument and offer of proof were irrelevant inasmuch as no approved visa petition was pending and no "continuing relationship [was] contemplated by either party" to the marriage (R. 30-31). In a written opinion, the immigration judge subsequently denied respondent's renewed application for adjustment of status on the ground that he was no longer eligible for such relief under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and 8 C.F.R. 245.1(d), due to Milligan's withdrawal of the visa petition that she previously had filed on his behalf (App. D, *infra*, 10a). The immigration judge also denied respondent's request for voluntary departure "as a matter of administrative discretion" (*id.* at 11a).[3]

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[2] Respondent was required to pay $300 each month for the first three months, $200 each month for the following three months, and $1 each month thereafter (R. 52-53).

[3] In support of his request for voluntary departure, respondent submitted evidence showing that he had been ar-

4. On appeal to the Board of Immigration Appeals, respondent argued for the first time (see R. 12) that the Service should be equitably estopped from denying his renewed application for adjustment of status because of its "unreasonable delay" in acting on his original application during the 18 months preceding the breakup of his marriage to Milligan (R. 42-45). In respondent's view, "18 months was more than a reasonable time for the government to have acted on the petition and the application for permanent residence" (R. 42). Without citing any authority, respondent also asked that the Board take administrative notice of the Service's alleged "policy" of scheduling similar cases "for combined hearing and adjudication in less than three months" (*ibid.*). Respondent stated (R. 44):

> The visa petition and the 245 application should have been approved in that 18 months

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rested in April 1977 (R. 62-64) and that he had pleaded guilty on June 23, 1977, to one count of defrauding the Pacific Telephone Company, in violation of § 502.7(b)(1) of the California Penal Code (West 1970) (App. D, *infra*, 10a). Sentence was suspended, and respondent was placed on summary probation for one year on the condition that he violate no law and make restitution in the amount of $3,547.72 (R. 62-64). On March 31, 1978, after respondent had made full restitution, he was permitted to withdraw his plea, and the conviction was set aside under § 1203 of the California Penal Code (West 1970) (App. C, *infra*, 5a-6a; App. D, *infra*, 10a).

The immigration judge denied voluntary departure "based upon the balancing of factors, both favorable and unfavorable. There is no indication that the respondent has close family ties in the United States. His marriage to a United States citizen is at an end. The recency of his conviction for a crime involving moral turpitude is a sufficient adverse factor without counterbalancing favorable factors for me to deny his application as a matter of administrative discretion" (App. D, *infra*, 11a).

> period of time and a failure to act was not only unreasonable, unfair and unjust but also an abuse of governmental process if the delay was deliberate. The question can only be asked as to why there was such a long delay on the part of the government to take any action on the pending petition and 245 application.

The Service challenged respondent's estoppel argument on several grounds. First, the Service noted (R. 11) that the delay was due not to the time required for processing respondent's adjustment of status application, but to the time required for investigating the immediate relative visa petition filed by Milligan, upon which the adjustment application rested. Inasmuch as respondent was merely the beneficiary of the visa petition, therefore, the Service asserted that he had no statutory right to contest this alleged delay.

Second, the Service contended (R. 11), as a jurisdictional matter, that the administrative decision of a District Director with respect to a visa petition is not reviewable by an immigration judge or the Board of Immigration Appeals in a deportation proceeding. Although the citizen who has filed the petition may appeal an adverse decision to the Board of Immigration Appeals (see 8 C.F.R. 3.1(b)(5)), the only recourse available to an aggrieved alien beneficiary is in the district court (R. 11-13). In this case, however, respondent did not complain of undue delay at the time of the District Director's action, and he did not seek review of either the District Director's denial of Milligan's visa petition or the denial of his original application for adjustment of status (see R. 12). Moreover, even at the hearing on his renewed adjustment application, respondent did not complain of any delay. Thus, he neither elicited nor proffered

any evidence to show that there was an undue investigative delay, whether any such delay was intentional, what the length of any intentional delay was, or who was responsible (R. 12-13).

Finally, the Service argued (R. 12-13) that respondent's estoppel claim was factually unsupported in any event. The Service asserted that, although the matter was not relevant to review of the order of deportation, the Service was "more than prepared to establish both that the investigative delay was excusable and that the respondent was not residing in a bona fide marital union with [Milligan] during the entire eighteen month period over which the respondent alleges he was eligible for adjustment of status" (R. 13).[4]

Based on the record established at the deportation hearing, the Board affirmed the immigration judge's denial of respondent's adjustment application because of "his statutory ineligibility for such relief" (App. C, *infra*, 7a). Moreover, notwithstanding the jurisdictional and procedural infirmities of respondent's estoppel claim, the Board rejected that claim on the merits (*ibid.*):

> [U]nder the facts of this case (where the denial of the visa petition resulted from its withdrawal by the respondent's wife followed by her filing a petition for divorce in a California Superior Court) we do not find a basis for any "equitable" estoppel even assuming Board jurisdiction to grant such relief. Moreover, we find no evidence of any "affirmative misconduct" by

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[4] In his reply brief, respondent failed to answer any of the legal arguments advanced by the Service, but asked that the Board "not consider [the Service's] *out of record* statements" (R. 9; emphasis in original) with respect to the sham character of his marriage to Milligan.

a Service officer regarding the denial of the visa petition.

5. Respondent appealed the Board's decision to the court of appeals. Although the administrative record was silent with respect to the Service's investigation during the 18-month period preceding Milligan's withdrawal of the visa petition and the District Director's denial of respondent's adjustment application, and although the court of appeals recognized that "[t]he Board found no evidence of any 'affirmative misconduct' by a Service officer regarding the denial of the visa petition" (App. A, *infra*, 2a), the court reversed the Board's decision (*id.* at 1a-2a). The court of appeals held that "[t]he unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petition's withdrawal following the breakup of Miranda's marriage was affirmative misconduct by the INS" (*id.* at 2a). The court remanded the case "for consideration of Miranda's application for permanent residence under the circumstances as they existed *at the time the INS should originally have acted*" (*ibid.*; emphasis added), with the additional requirement that "[t]he INS must, * * * in considering the [adjustment] application, treat the visa petition as if it were approved" (*ibid.*).

REASONS FOR GRANTING THE PETITION

Respondent has remained unlawfully in the United States for nearly a decade since the expiration of his nonimmigrant visitor's visa. By his own admission, he has worked throughout this period without authorization, and he has pleaded guilty to the commission of a felony. Nonetheless, the court of appeals has held that the Immigration and Naturalization Serv-

ice is estopped from denying respondent immediate relative status, and must consider his application for permanent resident status, even though he is statutorily ineligible for either benefit. The sole basis for the court's ruling is the "unexplained failure of the INS to act on the visa petition during the 18-month period between its filing and withdrawal." The holding that this delay constitutes "affirmative misconduct by the INS" warranting an estoppel against the government is without any legal basis and conflicts with decisions of this Court. See *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981).

Indeed, the decision below creates a novel principle of administrative law by applying a presumption of "affirmative government misconduct" whenever, in a court's view, the time spent in rendering a decision is "unreasonable" and the government has failed to account for the delay to the court's satisfaction. This approach is clearly inconsistent with the proper role of the courts in reviewing administrative action. As this Court recently noted in a related context, "[i]n taking this course, the Court of Appeals extended its 'writ beyond its proper scope * * *.'" *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981), slip op. 6.

1. Since the earliest days of the Nation, this Court has repeatedly and consistently held that the government may not be equitably estopped from enforcing the laws even though private parties may, as a result, suffer hardship in particular cases. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 369-370 (1813); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah* v. *United States*, 284 U.S. 534, 545-546

(1932); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Indeed, we are aware of no decision of this Court holding that an estoppel would or should lie against the government in any circumstance.

The Court most recently applied this principle in *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981). The question in that case was whether the Secretary of Health and Human Services was estopped from denying retroactive social security benefits to a person who would have been eligible for such benefits but for her failure to file a written application as required by statute. The applicant's failure resulted from her reliance on the erroneous advice of a government official, who also neglected to comply with the procedures recommended by the agency's Claims Manual. The court of appeals held that the "misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel." *Hansen* v. *Harris*, 619 F.2d 942, 948 (2d Cir. 1980). This Court reversed, noting (*Schweiker* v. *Hansen*, *supra*, slip op. 3) that it "has never decided what type of conduct by a government employee will estop the government from insisting upon compliance with valid regulations * * *." The Court also noted (*ibid.*) that, "[i]n two cases involving denial of citizenship, the Court has declined to decide whether even 'affirmative misconduct' would estop the government from denying citizenship, for in neither case was 'affirmative misconduct' involved. *INS* v. *Hibi*, 414

U.S., at 8-9; *Montana* v. *Kennedy*, 366 U.S., at 314-315."

The question whether, as a general matter, an estoppel will lie against the government in the extreme case of "affirmative misconduct" is likewise not presented here because respondent has made no such factual showing. The mere passage of 18 months prior to the making of an administrative decision hardly demonstrates misconduct of any kind, much less "affirmative" misconduct, and, in the absence of evidence to the contrary, it is to be assumed that such a delay is the result of the agency's obligation to investigate fully the matter presented to it for decision. Indeed, in basing an estoppel merely on a presumption of "affirmative misconduct" arising from an unexplained delay, the court of appeals ignored a second fundamental and long-standing principle of administrative law. As the Court stated in *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926): "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." [5]

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[5] An estoppel based on a presumption of administrative misconduct is particularly inappropriate in the immigration area, given this Court's recognition that " 'over no conceivable subject is the legislative power of Congress more complete * * *.' " *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977), quoting *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). If Congress had wished to limit the amount of time that the Service may take in investigating a visa petition, or mandate the granting of immediate relative status if the investigation were continued beyond that time, Congress clearly could have done so. Congress has not done so, however, and it is beyond the province of the judiciary to impose such limitations or penalties. See *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981), slip op. 13; *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

See also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971).

The estoppel imposed by the court below is unwarranted for two further reasons. First, Congress provided for the granting of immediate relative status to alien relatives of American citizens, not for the benefit of aliens, but for the benefit of citizens. Thus, when Milligan voluntarily withdrew her visa petition, and a visa was therefore no longer "immediately available" to respondent, the explicit congressional policy articulated in Section 245(a) of the Act, 8 U.S.C. 1255(a), and the administrative policy of 8 C.F.R. 245.2 (a)(2), each mandated denial of respondent's application for adjustment of status. The finding of an estoppel was inappropriate because respondent was not deprived of any benefit that Congress had conferred on him, as opposed to Milligan. Second, to give rise to an estoppel, government conduct must at least have caused the complaining party to take or fail to take some action that he cannot now correct. See *Schweiker* v. *Hansen*, *supra*, slip op. 4. Respondent has failed to show any such harm here. Indeed, the duration of the government's investigation clearly benefited respondent by further extending his unlawful stay.[6] Moreover, even if the Service had

[6] In fact, the delay has resulted in the removal of one bar to respondent's eligibility for discretionary relief under Section 244(a) of the Act, 8 U.S.C. 1254(a), because he has now been "physically present in the United States for a continuous period of * * * seven years." In addition, as respondent noted in his brief in the court of appeals (Br. 11), he has also utilized the further delay occasioned by his appeal from the Board's decision to remarry his first wife, who is now a permanent resident alien (as a consequence of an intervening marriage) and who has filed a new visa petition on respondent's behalf under 8 U.S.C. 1153(a)(2).

granted the visa petition prior to its withdrawal by Milligan, that action would not ultimately have benefited respondent because the approval would have been revoked automatically (see 8 C.F.R. 205.1 (a)(4)) once his divorce had come to light.[7]

Finally, as this Court has remarked, the government cannot be put " 'at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of the [practical requirements] which experience has taught to be essential to the honest and effective administration of the [law].' " *Schweiker* v. *Hansen*, *supra*, slip op. 5, quoting *Hansen* v. *Harris*, 619 F.2d 942, 956-957 (2d Cir. 1980) (Friendly, J., dissenting) (footnote omitted). The Court's reasoning applies with even greater force here, where the estoppel found by the court of appeals was premised not on an official's failure to follow instructions, but merely on the "unexplained" length of time that the government took to complete an investigation. Given the great potential for abuse in the area of immediate relative visa petitions filed by citizen spouses, there can be no doubt, as the Ninth Circuit has previously recognized, that careful investigations are essential. See *Pena-Urrutia* v. *INS*, 640 F.2d 242, 244 (9th Cir. 1981). See also 8 U.S.C. 1251(c); *INS* v. *Errico*, 385 U.S. 214 (1966) (sham marriage); *Lutwak* v. *United States*, 344 U.S. 604 (1953) (convictions relating to operation of sham marriage business); *United States* v. *Bithoney*, 631 F.2d 1, 4-5 (1st Cir. 1980), cert.

[7] Even when an alien has actually received an adjustment of status, the adjustment may be rescinded within five years if "the person was not in fact eligible for such adjustment" (8 U.S.C. 1256(a)) because, for instance, he was a party to a sham marriage. See also 8 C.F.R. Part 246.

denied, No. 80-825 (Jan. 12, 1981) (same); *Skelly* v. *INS*, 630 F.2d 1375, 1382 (10th Cir. 1980) (sham marriage). By requiring that immediate relative status be granted to an alien who is statutorily ineligible for that status, because of the Service's delay in acting on a visa petition, the decision below will result in incomplete scrutiny of many such petitions.[8]

2. In *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981), the Court held that the Ninth Circuit had "extended its 'writ beyond its proper scope'" (slip op. 6) by "improvidently encroach[ing] on the authority which the [Immigration and Nationality] Act confers on the Attorney General and his delegates" (*id.* at 5). The

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[8] A staggering number of "immediate relative" visa petitions are filed each year. In 1976, for instance, the year in which Milligan filed her petition on behalf of respondent, some 206,319 such petitions were filed. *1976 Annual Report: Immigration and Naturalization Service* 11. In 1975, the number of petitions filed was 224,012 (*ibid.*). "Credit for this reduction is given to the increased efforts in fraud detection" (*ibid.*). Significantly, the Service noted (*ibid.*):

> In dealing with these petitions, an inordinate amount of fraud, particularly in relation to claimed marriages, has been uncovered. Whole armies of "marriage arrangers" prey upon these aliens desperately seeking admission to this country. For a fee, partners are provided and marriages contracted to establish eligibility under the statutes for visa issuance benefits. A considerable portion of the Service's resources is expended to search out and expose the perpetrators and participants in such sham marriages.

The haste that the court's ruling will occasion would be particularly damaging in the investigation of "immediate relative" petitions filed on behalf of spouses of American citizens. Not only are such petitions subject to substantial abuse, but the validity of a marriage often involves difficult factual and legal determinations. See 1 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 2.18a (1981).

same "improvident encroach[ment]" exists here. The court below ignored respondent's failure to raise his claim in the proper forum at the proper time, as well as his failure to make any factual record in the immigration court concerning the allegedly improper investigatory delay. As in *Wang*, the court of appeals' failure to require that respondent's claim be properly raised and factually supported in the record would allow "many aliens [to] obtain a hearing based upon quite minimal showings" (slip op. 6).

Moreover, the court of appeals disregarded the narrow scope of judicial review set forth in the Immigration and Nationality Act. In Section 106 (a)(4) of the Act, 8 U.S.C. 1105a(a)(4), Congress specifically provided that the jurisdiction of the courts of appeals in deportation cases should be confined to a review "solely upon the administrative record * * * and the * * * findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." Although noting that the Board "found no evidence of any 'affirmative misconduct' by a Service officer regarding the denial of the visa petition" (App. A, *infra*, 2a), the court below nonetheless rejected the Board's finding, without any discussion of the question, by simply asserting that the "unexplained" 18-month investigative period constituted affirmative misconduct giving rise to an estoppel.[9] The court ordered (*ibid.*; emphasis added) that the case "be remanded for consideration of [respondent's]

[9] The Service's conduct during the 18-month period was "unexplained" to the court of appeals only because it was irrelevant to respondent's deportation proceedings. As noted above (see page 8, *supra*), however, the Service informed the Board that it was prepared to explain the length of the investigation. At the least, the court of appeals should have remanded to the Board for this purpose.

application for permanent residence under the circumstances as they existed *at the time the INS should originally have acted.* The INS must, however, * * * treat the visa petition as if it were approved." Inasmuch as respondent never attempted to show that any part of the time spent by the Service in completing its investigation was unjustified, the court of appeals had no basis for determining at what time, even in its subjective view, "the INS should have acted." Despite this defect, the court found affirmative misconduct warranting the imposition of an estoppel and required that the Service engage in the wholly unauthorized fiction of "treat[ing] the visa petition as if it were approved" (*ibid.*).

The effect of the court's order is not totally clear. Section 245(a) of the Act understandably makes no provision for accommodating the legal fiction that the court has imposed upon the Service, and it is uncertain whether the Service is now free to consider the evidence that it has developed (but that was legally irrelevant prior to the decision below), showing that respondent's marriage was a sham from the outset. Likewise, it is uncertain whether, in "treat[ing] the visa petition as if it were approved," the Service is precluded from revoking the visa under 8 C.F.R. 205.1(a)(4). If the court's opinion means that the Service is forever estopped from questioning the bona fides of respondent's former marriage, and if the Service is now required to grant respondent an irrevocable special status as the beneficiary of a fictitious immediate relative visa petition, it is all the more clear that the Ninth Circuit has "improvidently encroached on the authority which the Act confers on the Attorney General and his delegates." *INS* v. *Wang, supra,* slip op. 5.

3. The estoppel issue presented by this case is important. In 1976, the year in which Milligan's visa petition was filed, the Service received more than 206,000 "immediate relative" petitions, all of which required investigation. See page 15, note 8, *supra*. Given the size of this caseload and the difficulty of the issues presented for administrative determination, delays are inevitable. The haste imposed upon the Service by the holding below will certainly impede the effectiveness of the Service's efforts to ferret out fraud and to enforce the immigration laws fairly with respect to all persons seeking entry to this country. See *INS* v. *Wang*, *supra*, slip op. 7. The adverse effect of this holding is particularly significant, of course, in light of the large share of immigration cases that are adjudicated in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal. In the alternative, the petition should be granted and the judgment of the court of appeals should be vacated and the case remanded for reconsideration in light of *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981).

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

BARRY SULLIVAN
Assistant to the Solicitor General

VICTOR D. STONE
Attorney

JULY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-7370

HORACIO RAMOS MIRANDA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition for Review from Order of the Board of Immigration Appeals

Argued and Submitted June 5, 1980

[Filed Oct. 30, 1980]

OPINION

Before: PREGERSON and NELSON, Circuit Judges, and WILKINS,* District Judge.

PHILIP C. WILKINS, District Judge

Miranda seeks judicial review of a Board of Immigration Appeals (BIA) decision. Said decision dismissed the appeal of the order of deportation and of the denial of petitioner's application for adjustment of status or for voluntary departure. Petitioner argues that the Immigration and Naturalization Service (INS) should be estopped from denying him the status of permanent resident pursuant to the pro-

* Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

visions of Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255, due to its delay in processing an immediate relative visa petition filed by his then wife on his behalf. The Board found no evidence of any "affirmative misconduct" by a Service officer regarding the denial of the visa petition. We reverse.

The unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petition's withdrawal following the breakup of Miranda's marriage was affirmative misconduct by the INS. *See Villena* v. *INS*, No. 78-2954, slip opinion 3605, —— F.2d —— (9th Cir. 1980) (en banc); *Sun Il Yoo* v. *INS*, 534 F.2d 1325 (9th Cir. 1976).

The matter will be remanded for consideration of Miranda's application for permanent residence under the circumstances as they existed at the time the INS should originally have acted. The INS must, however, in considering the application, treat the visa petition as if it were approved.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-7370

HORACIO RAMOS MIRANDA, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed Mar. 24, 1981]

ORDER

Before: PREGERSON and NELSON, Circuit Judges, and WILKINS,* District Judge

The panel has voted to deny the petition for rehearing. Judges Pregerson and Nelson have voted to reject the suggestion for rehearing en banc, and Judge Wilkins recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Philip C. Wilkins, Chief United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

Jul. 17, 1979

File: A22 380 487—Los Angeles

In re: HORACIO RAMOS MIRANDA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Jack T. Price, Esq.
448 South Hill Street
Suite 718
Los Angeles, Calif. 90013

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant remained longer than permitted

APPLICATION: Adjustment of status, voluntary departure

The respondent appeals from an April 6, 1978, decision of an immigration judge finding him deportable as charged, denying his applications for adjustment of status and voluntary departure, and ordering his deportation to the Philippines. The appeal will be dismissed.

The respondent is a 47-year-old native and citizen of the Philippines, who entered the United States as a visitor for pleasure in July 1971. He married

a United States citizen in May 1976 and she filed a visa petition on his behalf in June 1976. In December 1977, however, the respondent's wife informed the Service that she was withdrawing the visa petition.[1] That same month, the District Director denied the respondent's application for status as a permanent resident based on a finding that he had failed to establish that an immigration visa was immediately available.

An Order to Show Cause had been issued on December 7, 1977, charging the respondent with being deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an "overstayed" visitor. At hearings held in March 1978, the respondent conceded deportability, but applied for adjustment of status under section 245 of the Act, 8 U.S.C. 1255. Alternatively, he requested voluntary departure under the provisions of section 244(e), 8 U.S.C. 1254(e).

The immigration judge denied the application for adjustment of status based on respondent's failure to establish eligibility for an immigrant visa. See Section 245(a)(2) and (3). As regards the application for voluntary departure, the respondent admitted that he had been convicted in a California state court in 1976 for a misdemeanor offense involving the possession of a "blue box" (a devise used to defraud the telephone company of its services). It was subsequently determined that the respondent had been convicted on his plea of guilty in June 1977, placed on "summary" probation for a period of one year, and ordered to make restitution to the telephone company in the amount of some $3,500. On March 31,

[1] The respondent's wife filed a petition for divorce in a California Superior Court on December 20, 1977.

1978, the State court terminated probation and vacated the conviction under the provisions of section 1203.4 of the California Penal Code following proof that restitution had been made.

The immigration judge determined that the expungement of the respondent's record of conviction under section 1203.4 of the California Penal Code removed any bar to his establishing good moral character under the provisions of section 101(f) of the Act, 8 U.S.C. 1101(f). *See Matter of Ibarra-Obando*, 12 I&N Dec. 576 (BIA 1966; A.G. 1967) (effect of expungement of non-drug offense under section 1203.4 of the California Penal Code); *Matter of G-*, 9 I&N Dec. 159 (BIA 1959; A.G. 1960); *Matter of H*, 6 I&N Dec. 619 (BIA 1955). *But see, Ocon-Perez* v. *INS*, 550 F.2d 1153 (9 Cir. 1977); *Burr* v. *INS*, 350 F.2d 87 (9 Cir. 1965), *cert. denied* 383 U.S. 915 (1966). The immigration judge concluded, however, that the conduct underlying the vacated conviction could be considered in determining whether favorable discretionary consideration of the application for voluntary departure was warranted. *See Matter of Gonzalez*, Interim Decision 2564 (BIA 1977); *Matter of H-, supra.* In view of the recency of the respondent's conviction and his absence of familial ties to the United States, the immigration judge concluded that voluntary departure should be denied in the exercise of discretion.

On appeal, the respondent, through counsel, submits that the Service should be "equitably" estopped from denying the adjustment of status application because the Service had sufficient time during the 18 months between the filing of the visa petition and its withdrawal by the respondent's wife to have acted on both the petition and the application for permanent resi-

dence. However, under the facts of this case (where the denial of the visa petition resulted from its withdrawal by the respondent's wife followed by her filing a petition for divorce in a California Superior Court) we do not find a basis for any "equitable" estoppel even assuming Board jurisdiction to grant such relief. Moreover, we find no evidence of any "affirmative misconduct" by a Service officer regarding the denial of the visa petition. See *INS* v. *Hibi*, 414 U.S. 5 (1973); *Santiago* v. *INS*, 526 F.2d 488 (9 Cir. 1975), *cert. denied* 425 U.S. 971 (1976). *But see Sun Il Yoo* v. *INS*, 534 F.2d 1325 (9 Cir. 1976). Accordingly, we find the respondent's application for adjustment of status under section 245 was properly denied based on his statutory ineligibility for such relief.

As regards the denial of voluntary departure, we find that the immigration judge properly concluded that the respondent was not statutorily precluded from establishing his good moral character under the provisions of section 101(f) of the Act by virtue of his conviction for possession of a "blue box." Wholly aside from the fact that the non-drug offense was expunged under section 1203.4 of the California Penal Code (*See Matter of Ibarra-Obando, supra*), that single conviction qualified as a petty offense within the meaning of section 212(a)(9) of the Act and, thus, was not within scope of section 101(f). *See Matter of Urpi-Sancho*, 13 I&N Dec. 641 (BIA 1970). The misconduct underlying that conviction, however, was properly considered by the immigration judge in determining whether the respondent was deserving of a discretionary grant of voluntary departure. *See Matter of Turcott*, 12 I&N Dec. 206 (BIA 1967).

In view of the recency and extent of this misconduct (as evidenced by the amount of restitution required),

we consider it to be an adverse factor relevant to the exercise of discretion even in view of the respondent's restitution of some $3,500 to the telephone company and the subsequent expungement of the conviction. We find no countervailing equitable considerations alleged by respondent sufficient to warrant a favorable exercise of discretion. In fact, other than contesting the weight to be attached to the misconduct surrounding the "blue box" offense, no countervailing equities are alleged by the respondent. Therefore, we find no error with the immigration judge's determination that voluntary departure was appropriately denied in the exercise of discretion.

The appeal will accordingly be dismissed.

ORDER: The appeal is dismissed.

/s/ David L. Milhollan
Chairman

APPENDIX D

UNITED STATES IMMIGRATION COURT
UNITED STATES DEPARTMENT OF JUSTICE
Los Angeles, California

File No. A22 380 487 April 6, 1978

IN THE MATTER OF
HORACIO RAMOS MIRANDA, RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act, Section 241(a)(2); nonimmigrant remained longer than permitted

APPLICATION: Adjustment of status under Section 245; in the alternative, voluntary departure in lieu of deportation

ON BEHALF OF RESPONDENT:

Jack T. Price, Esq.
448 South Hill Street
Suite 718
Los Angeles, California

ON BEHALF OF SERVICE:

William Odencrantz, Esq.
Trial Attorney
Los Angeles,
California

DECISION OF THE IMMIGRATION JUDGE

In pleading to the Order to Show Cause, the respondent admitted that he entered the United States as a visitor for pleasure on July 23, 1971, and that he has

remained in this country without authority since December 1, 1971. He conceded and I am satisfied that he is deportable on the charge set out in the Order to Show Cause.

Respondent has filed an application for adjustment of status under Section 245 claiming that he is eligible for such relief on the basis of his marriage to a United States citizen, Linda Milligan. A visa petition, although filed by Linda Milligan, was withdrawn by her on December 5, 1977, prior to adjudication by the District Director, *Exhibit No. 2.* As the respondent is not the beneficiary of a valid unexpired visa petition, he is not eligible for the benefits of Section 245, 8 C.F.R. 245.1(d). His application is denied.

Respondent has applied for the privilege of voluntary departure. The respondent was convicted upon his plea of guilty in the Municipal Court, North Orange County, California, on June 23, 1977 for violation of Section 502.7(b)(1) of the California Penal Code. The offense is commonly called, "Blue Box" crime. It penalizes those who obtain telephone or telegraph services "with intent to defraud." The crime involves moral turpitude since a necessary element to convict is the intent to defraud. *Matter of Kinney,* 10 I & N Dec. 548.

Upon making full restitution of $3,547.72 to the telephone company, the respondent was permitted to withdraw his plea of guilty and the crime was expunged under Section 1203.4 of the California Penal Code.

The expungement of the record of conviction under California law removes the bar to establishing good moral character. *Matter of H.,* 7 I & N Dec. 249. The conviction and the nature of the criminal activity

which resulted in that conviction will be considered in determining whether the application for voluntary departure merits favorable consideration. *Matter of H.*, 6 I & N Dec. 619, *Matter of Gonzalez*, Int. Dec. 2564.

Although the respondent may be eligible for the discretionary relief of voluntary departure, this does not mean that he must be granted that relief. Discretion must be based upon the balancing of factors, both favorable and unfavorable. There is no indication that the respondent has close family ties in the United States. His marriage to a United States citizen is at an end. The recency of his conviction for a crime involving moral turpitude is a sufficient adverse factor without counterbalancing favorable factors for me to deny his application as a matter of administrative discretion.

ORDER:

IT IS ORDERED that the respondent's application for adjustment of status under Section 245 of the Act be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to the Philippines on the charge set forth in the Order to Show Cause.

/s/ Jay Segal
JAY SEGAL
Immigration Judge

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